



Massachusetts Law Quarterly

SPECIAL NUMBER, NOVEMBER 22, 1928

THE MASSACHUSETTS BAR ASSOCIATION
ISSUES THIS SPECIAL NUMBER OF THE MASSACHUSETTS LAW
QUARTERLY TO COMMEMORATE THE
FIFTH BENCH AND BAR NIGHT
OF THE
BAR ASSOCIATION OF THE CITY OF BOSTON
AT WHICH WE WELCOME THE PRESIDENT OF THE AMERICAN BAR
ASSOCIATION TO MASSACHUSETTS

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RULES AS TO MEMBERSHIP IN THE MASSACHUSETTS BAR ASSOCIATION
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NON-RESIDENT MEMBERSHIP IN THE BAR ASSOCIATION OF THE CITY OF BOSTON

As they are not generally known, the attention of members of the Massachusetts Bar Association, outside of Boston, is called to the following rules as to non-resident membership of the Bar Association of the City of Boston:

NON-RESIDENT MEMBERS

Any member of the Bar regularly admitted to practice in any state of the United States or in any foreign country not residing in or practicing law in the City of Boston elected to membership by vote of the Council. The dues for non-resident members are \$5.00 per annum.

MEMBERSHIP APPLICATION

Application for membership, both resident and non-resident, should be made to Alexander Wheeler, Esquire, Secretary of the Committee on Admissions, 199 Washington Street, Boston. Telephone, Hubbard 4530. Membership Application Blanks may also be obtained at the rooms of the Association, the Parker House, Boston.

Non-resident membership includes the privilege of using the lounge and dining room of the Association at the Parker House, and the receipt of the Bar Bulletin. Arrangements have been made with the hotel so that members on reasonable notice may secure bedrooms in the hotel at the usual rates.

MEMBERSHIP IN THE MASSACHUSETTS BAR ASSOCIATION

The attention of members of the Bar Association of the City of Boston is called to the rules as to membership in the Massachusetts Bar Association.

"Any member of the legal profession in good standing, practicing in the Commonwealth of Massachusetts may become a member by vote of the Association or of the Executive Committee upon recommendation of the Committee on Membership, and upon paying the annual dues of the current year." The annual dues are \$5.00. Candidates should be proposed in writing by one or more members of the Association and the proposal should be sent to the Secretary, F. W. Grinnell, 60 State St., Boston, or to the Assistant Secretary, Dunbar F. Carpenter, 50 State St., Boston, or to the Chairman of the Committee on Membership, J. Colby Bassett, 30 Federal St., Boston. THE MASSACHUSETTS LAW QUARTERLY, published by the Association, and containing much information as to Massachusetts law and legal history, is sent to each member of the Association without charge.

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PROGRAMME
OF THE
FIFTH BENCH AND BAR NIGHT
OF THE
BAR ASSOCIATION OF THE CITY OF BOSTON

NOVEMBER 22, 1928

THOMAS W. PROCTOR
*President of the Bar Association of the City of Boston
Presiding*

FREDERICK W. MANSFIELD
President of the Massachusetts Bar Association

GURNEY E. NEWLIN
President of the American Bar Association

TO BE FOLLOWED BY THE PHOToplay
"THE EVE OF THE AMERICAN REVOLUTION"
PRODUCED BY THE YALE UNIVERSITY PRESS

INTRODUCTION TO SOME PORTRAITS OF EARLY AMERICAN LAWYERS

The portraits of leaders of the prerevolutionary bar of the eighteenth century, in their picturesque costumes, add life and color to our legal history, just as historical novels like Chambers' "Cardigan" and Davis' "Gilman of Redford", and the historical photoplays, carefully prepared under the supervision of members of the Department of History of Yale University, one of which we are to see to-night, help us to visualize parts of the Revolutionary story. Original portraits of Robert Auchmuty, Senior, Jeremiah Gridley, Benjamin Pratt, Oxenbridge Thacher and Edmund Trowbridge have recently been discovered. By the courtesy of Mr. F. W. Bayley, of the Copley Gallery, we are able to reproduce them.

INFLUENCE OF A TRAINED BAR (1706-1775)

A trained bar must exist before a community can have a trained bench. As there were practically no lawyers at all before 1700, it is not surprising that between 1700 and 1775 only four men educated in the law appeared on the highest bench. These men were Benjamin Lynde, Paul Dudley, Edmund Trowbridge and William Cushing. By the middle of the eighteenth century the needs of the community called an able bar into existence, and the legal problems of government brought forth high talents so that the prerevolutionary bar stands out as of greater importance than the bench of the period. It was a small bar from our standpoint,—the number of barristers [entitled to practice before the highest court] at the most active period just before the Revolution being about 25 in the whole province.

In the development or "making" of law, the imagination, and what Judge Story called, "powers of generalization" of the bar, contribute far more than the community realizes to the gradual development of law by the courts and legislatures. Men like those herein pictured and their pupils and successors—Otis, John Adams, and Theophilus Parsons—were pioneers in developing our law and the professional standards and traditions of character of our bar. Whatever their faults, we owe much to them and in these days, when a favorite indoor sport appears to be the belittling of effective leaders in our history, they deserve our respectful remembrance.



ROBERT AUCHMUTY, SR.

(From a portrait by Joseph Badger)

CONDITIONS OF LEGAL TRAINING (1722-1775)

Surprise is sometimes expressed that the lawyers of the Revolutionary period were so well-informed. The explanation, probably, is found in the maxim of Otis quoted by Tudor, that "a lawyer ought never to be without a volume of natural or public law, or moral philosophy on his table, or in his pocket." Otis studied law in Gridley's office. John Adams tells us that he borrowed Roman law books of Gridley, who advised him to read them. This means that men had, or made, more time to read in those days than now. Available literature was more limited and the educated lawyers, like Gridley, Pratt, Otis, Thacher, Trowbridge and John Adams, either accumulated libraries or borrowed them and read everything they could lay their hands on.

The way in which such men trained themselves is indicated by the statement of Otis to his brother, that "Blackstone's 'Commentaries' would have saved him seven years labour poring over and delving in black letter." The first volume of Blackstone was not published in England until 1765 and the other three volumes appeared within the next four or five years. (See "Commonwealth History of Massachusetts," Vol. II, 173-4.)

ROBERT AUCHMUTY, SENIOR

Robert Auchmuty was born in Scotland, educated in Dublin and studied law in The Temple. He was admitted to practice in Boston in 1720 and, according to Washburn, "The profession owed much to his character and efforts for the elevated stand it was beginning to assume, and the system and order which now began to distinguish its forms and practice". In 1733, he was appointed to succeed Judge Byfield as a judge of the Court of Admiralty, the jurisdiction of which included Massachusetts, New Hampshire and Rhode Island. He held that office until 1747. In 1741, he was sent to England in connection with the disputed boundary line between Rhode Island and Massachusetts. According to Washburn, he is said to have planned the expedition of the provincial troops against Louisburg while he was in England. He died in April, 1750.

A still greater lawyer was

JOHN READ

John Read was born about 1677 and was graduated at Harvard in 1697. After studying theology and preaching in Connecticut for a time, he studied law and was admitted to the bar about 1720. He moved to Massachusetts about 1722 where he promptly acquired a commanding position and has been referred to, accord-



JEREMIAH GRIDLEY

(From a portrait by Smibert dated 1831)

ing to Washburn, as, "the greatest common lawyer that ever lived in New England prior to the Revolution". However that may be, it seems to be commonly agreed that Read was the most influential pioneer lawyer in Massachusetts.

He appears to have been a man of exceptional intelligence and force of character, who "reduced the jarring and contradictory forms of practice to a system, taught courts the advantages of precedents, and practitioners the value of knowledge". He also reduced the habitually "quaint, redundant and obscure phraseology" of the English deeds of conveyance to shorter and simpler forms, the common use of which he introduced. Copies of some of Read's original writs were preserved and published in the books of precedents as late as 1834.

He served as attorney-general from 1733-1735, and in 1738 he was elected to the General Court—apparently the first lawyer ever chosen to that body. Hutchinson in a note to the third volume of his "History of Massachusetts Bay" (p. 104) says "Under the first charter, appeals being from the Courts of Judicature to the General Assembly for which reason no practising lawyers were allowed to sit. I do not recollect that the town of Boston ever chose a lawyer to represent under the second charter until the year 1738; when Mr. John Read was chosen, but he was left out the next year; and in 1758 and 59, Mr. Benjamin Pratt was member for the town. These men were of the first character in their profession. Lawyers have ever since taken the lead, and been much employed in the publick measures of this, and of the other colonies, and of the Continental Congresses."

Unfortunately, no portrait of Read has yet been discovered. Next to Read, the most influential early lawyer was

JEREMIAH GRIDLEY

He graduated from Harvard in 1725 and, after a few years of school teaching and the study of theology, turned to the bar and rapidly made such a position for himself that he is sometimes referred to as "The Father of the Boston Bar". He appears to have been one of those wise, able, and kindly lawyers who gain the respect and affection of the bench and bar, and the influence of whose personality is found throughout the community in which they live.

Jeremiah Gridley represented the Crown at the argument in support of the application for the Writs of Assistance in 1761. As it was in his office both Oxenbridge Thacher and James Otis, Jr., studied law, that ease presented the picture of the master on one side and two of his pupils on the other. Gridley served for twelve years from 1755 as Grand Master of Masons of all North America. Like a number of other leading lawyers in our history, he appears to have been careless of his own interests and in 1767 he died poor at the age of sixty-two.



BENJAMIN PRATT

(From a portrait by Smibert)

BENJAMIN PRATT

Washburn says, "The name of Mr. Pratt is too intimately associated with the character of the Massachusetts bar to be ever forgotten by any one who may write its history. His success is an illustration of what may be accomplished in the profession by study and assiduity."

"He was born in 1709, in Cohasset. His parents were poor and in very humble life, and he himself was bred to a mechanical trade. He lost a limb under circumstances of severe suffering, attended with a long and painful sickness, and upon his recovery he was led to apply himself to a preparation for college. He entered Cambridge in one of the higher classes and was graduated in 1737. His standing there graduating it by the rank of his family, was the lowest in his class. But he surmounted all these embarrassments. He found a friend in Mr. Auchmuty, in whose office he read law, and whose daughter he afterwards married. He was then and long after an indefatigable student, and such was his intensity of application that he would sit engrossed with his law book while he was suffering such excruciating pain from his limb which had been amputated, that large drops of sweat ran down his cheeks.

"He soon rose to eminence, and took the very first rank in his profession for learning and ability.

"In his politics he was opposed to Governor Shirley, but was a personal friend and supporter of Governor Pownal.

"In 1761, he was appointed Chief Justice of New York, through the influence of Governor Pownal, and for that reason declined taking any part in the discussion of the question relative to writs of assistance, although both sides applied to him as counsel. He was present at the hearing, and is graphically described by John Adams in his picture of the scene.

"In a corner of the room must be placed as a spectator and an auditor, wit, sense, imagination, genius, pathos, reason, prudence, eloquence, learning and immense reading, hanging by the shoulders on two crutches, covered with a great cloth coat, in the person of Mr. Pratt. Adams was an enthusiast, but even so, the man who could inspire such a description must have been a rare spirit. His portrait seems to us the most interesting of those here reproduced.

"An interesting address from the bar to Mr. Pratt on his leaving Massachusetts, and his reply to the same, which are found in the newspapers of the day, serve to show the high estimation in which he was held by his associates who knew him best. Great jealousy was felt by the profession and people of New York, in having a stranger appointed to the place of Chief Justice of that Province. But the consummate ability exhibited by Mr. Pratt in the trial of some exceedingly intricate and important causes which early came before him, overcame this feeling entirely, and secured the confidence and esteem of all parties." (Washburn, p. 225.)



OXENBRIDGE THACHER

(From a portrait by Robert Feke)

The following statement by Pratt to Governor Pownal is quoted by Woodruff in 5 Law Quarterly Review and illustrates the reason why our constitution forbids the exercise of judicial power by the legislature:

"There is no court of chancery in the charter governments of New England, nor any court vested with power to determine causes in equity, save only that the justices of the inferior court and the justices of the Superior Court respectively have power to give relief on mortgages, bonds and other penalties contained in deeds: in all other chancery and equitable matters both the Crown and subject are without redress. This introduced a practice of petitioning the legislative courts for relief, and prompted those courts to interpose their authority. These petitions becoming numerous, in order to give the greater dispatch to such business, the legislative courts transacted such business, by orders and resolves without the solemnity of passing Acts for such purposes; and have further extended this power by resolves and orders beyond what a court of chancery ever attempted to decree, even to the suspending of public laws, which orders and resolves are not sent home for the royal assent. The tendency of these measures is too obvious to need any observation thereon."

Governor Hutchinson, in a speech to the two Houses in 1772, strongly protested against such an assumption of judicial power by the General Court.

OXENBRIDGE THACHER

"Oxenbridge Thacher was intimately connected with James Otis in the events of the last century. He was born in Milton, and was graduated at Cambridge in 1738. He was then eighteen years of age. He first studied theology and preached awhile, but his voice being feeble he left the profession and entered the office of Mr. Gridley. He rose to great eminence in his profession. He also engaged zealously in the politics of the day, in favor of liberty, and was associated with Otis in the argument against the writs of assistance in 1761, in which they were opposed by their former tutor and instructor, Mr. Gridley.

"John Adams tells us that he argued the question 'with the softness of manners, the ingenuity and the cool-reasoning which were remarkable in his amiable character'. He was followed by Otis in the argument now pictured on the walls of the State House. Thacher was chosen a representative from Boston in 1763, and continued a member of the House till his death on July 8, 1765. He died at the early age of forty-five, and so early in the struggle for independence, that his name is not generally associated with those leading spirits who survived him."—Washburn's "Judicial History of Massachusetts," pp. 222-223.



EDMUND TROWBRIDGE
(From a portrait by Blackburn)

EDMUND TROWBRIDGE

A portrait of Judge Trowbridge with his account of conversations and correspondence as to Chief Justice Oliver and the juries in 1774, was published in the "QUARTERLY" for April, 1928. The portrait there reproduced was evidently painted during the latter part of his life. The portrait, by Blackburn, which appears in this number was recently discovered in an old New England farmhouse and represents him as a comparatively young man.

"Judge Trowbridge was born in Newton, in 1709, and was graduated at Cambridge at the age of nineteen. He resided and practised law in Cambridge, but was a regular attendant of the courts in some of the other counties. During a part of his life he bore the name of Goffe, after that of an uncle. . . .

"Such was his learning and ability, that it is said by President [John] Adams, he had the entire command of the practice in Middlesex, Worcester and several other counties, and had the power to crush any young lawyer by a frown or a nod. In his polities, he was inclining to the prerogative party, but did not lose the popular favor. In June, 1749, he was appointed by Governor Shirley Attorney General of the province, and held that office till his promotion to the bench of the Superior Court of Judicature in 1767. He was also for some years a member of the Council, and continued upon the bench until the Revolution.

"Hutchinson is said to have made pretty free use of Judge Trowbridge's legal knowledge while upon the bench, and when his brother Foster was made a judge, Trowbridge was urged, against his own better judgment, to remain in office for the very purpose of sustaining the Governor's brother. Judge Trowbridge continued to hold the place of judge, but lost his respect and friendship for the Governor. While most of those who held offices under the Crown, left the province at the breaking out of the Revolution, Judge Trowbridge remained unmolested, and retained the confidence and esteem of his former friends, and the respect of the public, though he ever after that event, remained in private life. He died at Cambridge at the age of eighty-four, April 2, 1793.

"His accuracy as a special pleader is evinced by the forms of his declarations and pleadings, which have been incorporated into our books of practice. His learning and discrimination as 'a real estate' lawyer, are conspicuous in the treatises which he left, some of which have been published in connection with the reports of our Supreme Court. . . . Many of the most distinguished lawyers in Massachusetts enjoyed the advantages of his instruction, among whom may be mentioned James Putnam, afterwards a judge of the King's Bench in New Brunswick, Chief Justice Dana, and Chief Justice Parsons."—Washburn's "Judicial History of Massachusetts," pp. 309-310.

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